Neutral Citation No. [2011] NIQB 2 | *Ref:* **GIL8063**

Judgment: approved by the Court for handing down | *Delivered:* **14/1/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

DAVID WYLIE

First named plaintiff;

-and-

DAVID SIMON WYLIE

Second named plaintiff;

-and-

LOUISE WYLIE (a minor)
by David Wylie her father and next friend

Third named plaintiff;

-and-

KEITH WYLIE (a minor)
By his sister and next friend Louise Wylie

Fourth named plaintiff;

-and-

JASON WYLIE

Fifth named plaintiff;

-and-

KENNETH BOLTON

defendant;

-and-

DAVID WYLIE

Second named defendant.

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GILLEN J

Application

[1] This is an appeal against the decision of Master Bell given on 18 November 2010 when he refused the appellant Liverpool Victoria, (an insurance company hereinafter referred to as "LV") leave to be joined as an additional defendant in this action and to grant leave to it to exercise the rights of Kenneth Bolton in the proceedings in which David Wylie is plaintiff pursuant to Order 15 r. 6.

Background

[2] There was no dispute between the parties as to the factual background to this matter as contained in an affidavit of John Caldwell, a partner in the firm of Caldwell Warner, solicitors, acting for LV. The action arises from a road traffic accident on 1 December 2000 when a vehicle driven by David Wylie, the first named plaintiff, collided with a horse owned by Kenneth Bolton in circumstances where Kenneth Bolton was guilty of negligence and/or breach of duty in permitting the horse to stray on to the public highway at night. The first named plaintiff is entitled to recover damages on the basis of full liability.

[3] In the road traffic accident the fourth named plaintiff, Keith Wylie (a minor), suffered most serious injuries. He was not wearing a seatbelt and the first named plaintiff David Wylie, who was responsible for ensuring that he was properly secured by a seatbelt, has been held by McCloskey J to be 25% to blame for his injuries. LV are the insurers of David Wylie in respect of the claim made against him by Keith Wylie, a minor. Accordingly in that aspect of the action in which Keith Wylie pursues his claim for damages against David Wylie, LV will be represented.

[4] David Wylie himself suffered serious personal injuries and his wife, a passenger, was killed in the accident. Accordingly he claims under the Fatal Accidents (Northern Ireland) Order 1976 on behalf of her dependants including himself and her estate under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937.

[5] Kenneth Bolton was insured by the National Farmers Union (NMU) Mutual but the policy cover had a limit of £1m. NMU Mutual negotiated settlements of the claims brought by David Simon Wylie and Louise Wylie and after payment of damages and costs this left a balance of £921,278.40. That sum was lodged to the credit of the joint account of the solicitors for David Wylie and the solicitors for Keith Wylie (a minor). It is believed that Kenneth Bolton has no capital or substantial income that would enable him to contribute further on a personal basis and accordingly he does not intend to

take any further part in the proceedings. Thus the remainder of the action is in reality presently proceeding undefended .

[6] The damages in the case of Keith Wylie (a minor) have not yet been assessed and Mr Caldwell asserts that his firm has no control over the speed at which that action is brought to a conclusion. David Wylie, as plaintiff, has proceeded by way of an assessment of damages.

[7] It is common case that it is likely that the sum of damages and costs of the two outstanding claims by David Wylie (the personal injury claim and the fatal accidents claim) and the damages payable to Keith Wylie (a minor) will exceed by a substantial margin the sum of £921,278.40 held in the joint account aforesaid. The defendant David Wylie is seeking an indemnity from LV as his motor insurers.

Order 15 Rule 6

[8] Order 15 Rule 6 where relevant provides:-

> "Subject to the provisions of this rule, at any stage of the proceedings, in any case or matter (whether before or after final judgment) the Court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) order any person who has been improperly or unnecessarily made a party or has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) order any of the following persons to be added as a party namely –
>
> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or

matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

The appellant's case

[9] Mr Ringland QC, who appeared on behalf of the appellant with Mr Maxwell, contended that LV's presence before the court was necessary under O. 15 r. 6(2)(b)(i) to ensure that all matters in dispute (the level of damages) may be effectually and completely determined and adjudicated upon. LV will be the effective paymaster of damages in the case of Keith Wylie . If there is insufficient money in the joint accounts to pay 75% of Keith Wylie's claim and a 100% of the two claims made by David Wylie LV may be liable to satisfy, as joint tortfeasor with Kenneth Bolton, the unsatisfied portion of the judgment that it is anticipated will be obtained by Keith Wylie (a minor). Accordingly it was contended that LV has a legal and financial interest in the outcome of the assessment of damages brought by David Wylie as plaintiff. The interests of LV were affected in two ways. First, if David Wylie were to receive more than he was entitled to in either of his claims by reason of his claims not being subjected to searching cross-examination, such overpayment could deplete the money in the joint account and thereby enlarge the potential exposure of LV beyond the 25% for which it was found responsible. Secondly, it is important for the protection of the interests of LV that the money and the joint account should not be depleted prior to the determination of the damages issue in the case of Keith Wylie (a minor).

[10] Alternatively it is contended that LV should be joined under O. 15 r. 6(2)(b)(ii) as a person because there exists between LV and David Wylie a question or issue arising out of or relating to or connected with the level of damages claimed which in the opinion of the court it should be just and convenient to determine as between him and that party as well as between the parties to the action itself.

[11] Relying on the obligation on the court to ensure a fair and equitable resolution of the proceedings Mr Ringland contends that it is inequitable that LV should be precluded from knowing what is being claimed by the other plaintiffs, or investigating the validity of those claims and having an opportunity appropriately to contest the quantum involved and in due course the manner and timing of the distribution of the money in the Bolton fund. There is no one except LV with whom David Wylie could negotiate to agree the damages and therefore the prospects of the case being settled are very remote with the attendant waste of court time and resources.

The respondent's case

[12] It is the respondent's contention that the only interest LV has arises out of the possible financial impact in relation to separate proceedings against the defendant Bolton. Mr Fee QC, who appeared on behalf of the respondent with Mr MacMahon, contended that if LV was permitted to avail of O. 15 r. 6 in this instance, it would provide an unhelpful precedent to later claimants becoming parties to earlier actions in order to contribute to an argument about the level of damages. In short it is his contention that pure financial interest in the outcome of an action is insufficient to merit invocation of O. 15 r. 6.

Principles governing this application

[13] Counsel drew my attention to a number of authorities in this case which included Burns v Burns (2003) NIJB 301, Millen v Brown (1984) NI 328, Sanders Lead Co Inc v Entres Metal Brokers Limited (1984) 1 All ER 857 , Gurtner v Circuit (1968) 1 All ER 328 and The Supreme Court Practice 1999 15/6/9 et seq.

[14] From these cases I have distilled the following principles. First, prima facie, the plaintiff is entitled to choose the person against whom to proceed and to leave out any person against whom he does not desire to proceed. It is only under O. 15 r. 6 that the court has power to exercise its discretion so that a person who is not a party may be added as defendant against the wishes of the plaintiff either on the application of the defendant or on his own intervention or in rare cases by the Court of its own motion. The jurisdiction of the court under this rule is entirely discretionary.

[15] The scope of the rule, so far as concerns the joinder of persons not parties, has been significantly extended by the addition of paragraph (2)(b)(ii). Mr Ringland indicated that it was principally this rule upon which he relied. The objects of this rule are broadly the same as the objects of the rule relating to third party proceedings namely:

(a) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action; and

(b) to prevent the same or substantially the same questions or issues being tried twice with possible different results.

[16] To entitle a person not a party to an action to intervene and to be joined as a party, the rule requires that the would be intervener should have some interest which is directly related or connected with the subject matter of

the action. In short where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener is directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly.

[17] Thus in Millen v Brown (1984) NI 328, Carswell J permitted the joinder on appeal of an insurer who was bound to satisfy by statute a judgment obtained against a particular defendant. He held that the requirements of O. 16, r. 6(2)(b)(ii) were satisfied by the creation or existence of a nexus between the plaintiff and insurers by virtue of Article 98 of the Road Traffic (NI) Order 1981.

[18] In Gurtner v Circuit (1968) 1 All ER 328 the Motor Insurers' Bureau was permitted to be added in an action arising out of a road traffic accident since any judgment in the action could be legally enforceable against it. The rationale was that the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.

[19] However the mere fact that the relief obtained by a plaintiff may affect someone who is not a party in respect of his rights and obligations is not enough. This is well illustrated by the judgment of Kerr LJ in Sanders Lead Co Inc v Entores Metal Brokers Ltd (1984) 1 All ER where he observed in the context of r. 6(2)(b)(ii) of the corresponding English rules :

> "In my view the rule requires some interest in the would be intervener which is in some way directly related to the subject matter of the action. *A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough.* (**My emphasis**). It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations which the interests of would be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as the alleged infringement of a patent, trademark or copyright with which the intervener is concerned …. Another illustration is provided for cases where the intervener can show that he will in some way be compelled to 'foot the bill' depending on the outcome of the action. … However, as counsel for Metal

> rightly conceded, no case has gone so far as to allow intervention by someone who is only a creditor or alleged creditor, with no more than a creditor's commercial interest in the outcome of the action and in my view it makes no difference whatever that the creditor in question is one who has obtained a Mareva injunction whose fate may in some way depend on the outcome …"

[20] Finally, in Burns v Burns (Royal and Sun Alliance Insurance Plc Third Party) (2003) NIQB 44, Higgins J, in an action by a plaintiff against his father in respect of a child who had an accident, refused to permit a third party insurer to be joined as an additional defendant to the action on the basis that the action between the plaintiff and the father was a "friendly action" in which the plaintiff had no intention of pursuing judgment against his father unless indemnified by the third party. Higgins J held that the presence of the third party was not necessary to ensure that the matters in dispute were effectually and completely determined, the third party having no interest in the issues between the plaintiff and the defendant relative to the facts of the accident.

My conclusions

[21] I have come to the conclusion that the decision of Master Bell in this matter should be affirmed. My first reason for so concluding is that I do not believe that LV in this case has anything other than a mere commercial interest in the outcome of those actions brought by the plaintiffs others than Keith Wylie a minor against Bolton . It has no sufficient nexus or interest directly related to the subject matter of the action arising out of the road traffic accident other than its obligations in relation to the case of Keith Wylie (a minor). It has no more interest in the other plaintiffs' action than would any number of other motorists who might have been involved in the accident and who wished to argue about the availability of damages for their compensation. Conceptually there are many cases where one party or other may have limited assets. This does not permit all those who may have a cause of action against that person to protect their commercial interests by intervening in each case brought on the basis that the overall pot may be diminished if the lead case is not properly conducted.

[22] I consider that the instant case is easily distinguishable from that in Gurtner v Circuit where the MIB would have been compelled to "foot the bill" of the defendant in question. There the nexus is clear and direct. In my view LV's interest in this action is similar to that of a creditor's commercial interest in the outcome of an action where LV do not insure Bolton and have no input at all into how he should deal with the matter.

[23] It is necessary in these instances to consider carefully the wording of O. 15 r. 6(b)(i) and (ii). So far as the former is concerned, I find nothing in LV's contention that leads me to believe that its presence is necessary to ensure that matters in dispute in the cause between the plaintiffs (other than Keith Wylie (a minor) can be effectually and completely determined and adjudicated upon without its presence. Similarly, so far as the latter rule is concerned, there is no question or issue arising out of or relating to or connected with the relief or remedy claimed by the other plaintiffs in this action which it would be just and convenient to determine between LV and those parties. There is no direct relationship between those plaintiffs and LV or anyone representing the interests of LV. The sum of money which LV may have to pay to Keith Wylie is not in any way directly related to the subject matter of the actions between the other plaintiffs and Kenneth Bolton. In short I consider that to accede to the appellant's case in this instance would amount to a wholly unwarranted extension of the principles that lie behind O. 15 r. 6.

[24] Accordingly I affirm the decision of the Master and award costs in both instances against the appellant.